



CAJ-AG/09/4/4

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Fourth Session
Geneva, October 23, 2009**

REPORT

adopted by the Administrative and Legal Committee Advisory Group

Opening of the session

1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its fourth session in Geneva on October 23, 2009, under the Chairmanship of the Vice Secretary-General of UPOV.
2. The list of participants is reproduced in the Annex to this document.

Adoption of the agenda

3. The CAJ-AG adopted the draft agenda, as proposed in document CAJ-AG/09/4/1.
4. The CAJ-AG noted that the CAJ had agreed at its fifty-ninth session, held in Geneva on April 2, 2009, that the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) and the International Seed Federation (ISF) should be invited to participate in part of the fourth session of the CAJ-AG, in order to present their comments and views on relevant matters. Items in which CIOPORA and ISF participated are noted in this report.

Explanatory Notes*Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention*

5. The CAJ-AG considered documents CAJ-AG/09/4/2 and UPOV/EXN/BRD Draft 2. The Chair recalled that the CAJ-AG had, at its third session, held in Geneva on October 28, 2008, requested the preparation of a new draft of document UPOV/EXN/BRD (document UPOV/EXN/BRD Draft 2), on the basis of reflections by the Office of the Union, for consideration by the CAJ-AG at its fourth session (see document CAJ-AG/08/3/4 “Report”, paragraph 38).

6. The CAJ-AG agreed the following concerning document UPOV/EXN/BRD Draft 2:

| | |
|----------------------|---|
| Section (d) (i) | <p>to include the following examples of “discovered and developed”:</p> <ul style="list-style-type: none"> - the discovery of a plant in a population, and the multiplication of that individual plant to obtain a variety that differs from the initial population, - the discovery of a mutant in a population and the multiplication of that individual mutant plant to obtain a variety that differs from the initial population. <p>In addition it was agreed that the Office of the Union would also consider the examples provided in the document “Clarification of Plant Breeding Issues under the Plant Breeder’s Rights Act 1991”, December 2002, prepared by the Expert Panel on Breeding of IP Australia (available at http://www.anbg.gov.au/breeders/plant-breeders-rights-act-report.pdf) and any other examples provided by members of the Union.</p> |
| Section (d) (ii) | <p>to read (new text underlined):</p> <p>“9. In accordance with the second indent of Article 1(iv) of the 1991 Act of the UPOV Convention, where the person who bred, or discovered and developed, a variety is an employee, the employer, <u>or the person who has commissioned the latter’s work,</u> may be the person entitled to obtain a breeder’s right, where the applicable law so provides.”</p> |
| Section (d) (iii) | <p>To ensure that the wording of paragraph 10 covers the following situation: if the person entitled to a breeder’s right dies, the heir of the aforementioned person would be the one entitled to transfer the title to another person.</p> |

7. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on the Definition of Breeder (document UPOV/EXN/BRD Draft 3) for consideration by the CAJ-AG at its fifth session, to be held on October 22, 2010.

Explanatory Notes on the Definition of Variety under the 1991 Act of the UPOV Convention

8. The CAJ-AG considered documents CAJ-AG/09/4/2 and UPOV/EXN/VAR Draft 2. The Chair recalled that at its third session, the CAJ-AG had requested the preparation of a new draft of document UPOV/EXN/VAR (document UPOV/EXN/VAR Draft 2), on the basis of reflections by the Office of the Union, for consideration by the CAJ-AG at its fourth session (see document CAJ-AG/08/3/4 “Report”, paragraph 40).

9. The CAJ-AG agreed the following amendments to document UPOV/EXN/VAR Draft 2:

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| Section (b) (i) | the first indent of paragraph 5 to be modified to clarify that an existing variety may be represented by a single plant or part(s) of a plant provided that the plant or part(s) of the plant could be used to produce the variety. The CAJ-AG agreed that the text and discussions at the 1991 Diplomatic Conference should be taken into account in the development of that explanation. |
| New section | to add a section concerning “suitability for being propagated unchanged” taking into account the particular case of hybrids. |

10. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on the Definition of Variety (document UPOV/EXN/VAR Draft 3), for circulation to the CAJ-AG and, in the absence of substantial concerns, a draft of the Explanatory Notes on the Definition of Variety would be submitted to the CAJ at its sixty-first session, to be held in Geneva on March 25, 2010. In the case of substantial concerns the Explanatory Notes on the Definition of Variety would be re-discussed by the CAJ-AG at its fifth session.

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

11. The CAJ-AG considered documents CAJ-AG/09/4/2 and UPOV/EXN/HRV Draft 4 and the comments received from ISF of October 9, 2009, which had been posted on the CAJ-AG section of the UPOV website. The Chair recalled that, at its third session, the CAJ-AG, had requested the Office of the Union to prepare a revised version of document UPOV/EXN/HRV (draft 3), to be circulated to the CAJ for comments. No comments on document UPOV/EXN/HRV Draft 3 were received by the deadline of September 26, 2009.

12. The CAJ-AG discussed the need to clarify that, in examples 3 and 4, (paragraphs 10 and 11 respectively of document UPOV/EXN/HRV Draft 4) the exported material was propagating material, although the exporter might have been acting in good faith. It was noted that the difference between examples 1 and 3 and between examples 2 and 4 was only in the “purpose” indicated for the respective material. In fact, the situations were the same. The CAJ-AJ discussed the possibility of providing some clarification on the notion of “unauthorized use”, and what could be considered a “reasonable opportunity to exercise his right” on the propagating material. It was agreed that it would be useful to provide examples where the breeder’s right did not extend to the harvested material.

13. With respect to the comments made by ISF, the CAJ-AG agreed that the proposals for clarifications of examples 3 and 4 above might address their comments and agreed that the explanatory notes were based on the 1991 Act of the UPOV Convention and should not make reference to the 1978 Act of the UPOV Convention.

(discussions in the presence of CIOPORA and ISF)

14. Due to the unavoidable absence of the Secretary General of CIOPORA, the representative of CIOPORA explained that written comments on documents CAJ-AG/09/4/2 and UPOV/EXN/HRV Draft 4 would be sent. With respect to document

UPOV/EXN/HRV Draft 4, CIOPORA considered that further explanation was needed on “unauthorized used”. CIOPORA also proposed to add examples whereby: (a) propagating material of an ornamental or fruit variety was exported, without the authorization of the breeder, to a territory where there was no plant variety protection for ornamental or fruit varieties and subsequently harvested product was imported in the territory where the variety was protected, and (b) a sub-licensee exported propagating material without authorization, and harvested material was then imported into a territory where the variety was protected.

15. The representative of ISF proposed the inclusion of the following additional example: propagating material of a variety protected in country A is exported without authorization to country B, and then to country C; from country C, the harvested material or a product made directly from the harvested material is imported into country A. In the example, to explain that plant variety protection was available in country B, but the breeder decided not to apply for protection because that was not a viable market, and plant variety protection was not available in country C.

16. The CAJ-AG noted that some of the comments in respect to licensing and the unauthorized use of propagating material raised by CIOPORA and ISF would be considered in relation to the “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”.

17. The CAJ-AG agreed the following:

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|-----------------------------------|--|
| SECTION I | to reproduce Article 14(1) of the UPOV convention at the beginning of the document |
| SECTION I (d) General | to place the titles before the examples and to create meaningful titles for each example |
| | to specify in examples 1 to 6 that the breeder did not have a reasonable opportunity to exercise his right on the propagating material |
| | to add an example as presented in paragraph 15 above |
| | CIOPORA to propose examples to clarify the notion of “unauthorized use” |
| SECTION I (d) Examples 3 and 4 | to clarify that the exported material, whilst indicated as “harvested material”, was in fact used as propagating material, and there was no authorization for export of propagating material |
| SECTION I (d) Example 3 | to replace colon with “and” |
| SECTION II | to provide an example where the right could not be exercised because it had been exhausted |

18. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on Acts in Respect of Harvested Material (document UPOV/EXN/HRV Draft 5) for circulation to the CAJ-AG and, in the absence of substantial concerns, a draft of the Explanatory Notes on Acts in Respect of Harvested Material would be submitted to the CAJ at its sixty-second session, to be held in Geneva on October 18 and 19, 2010. In the case of substantial concerns, the Explanatory Notes on Acts in Respect of Harvested Material would be re-discussed by the CAJ-AG at its fifth session.

Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention

19. The CAJ-AG considered documents CAJ-AG/09/4/2 and UPOV/EXN/CAL Draft 1.
20. The CAJ-AG agreed the following amendments to document UPOV/EXN/CAL Draft 1:

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|-------------|--|
| General | The CAJ-AG agreed that document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention” should not elaborate on matters concerning exhaustion, and |
| | To propose to the CAJ the development of a separate document on exhaustion of the breeder’s right. The CAJ-AG agreed that one of the aspects to be considered was whether the breeder’s right is exhausted if the conditions and limitations on which the breeder’s authorization was granted were not met |
| Section (b) | CIOPORA and ISF to provide comments and propose additional examples by November 6, 2009 |

21. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL Draft 2), for circulation to the CAJ-AG and, in the absence of substantial concerns, a draft of the Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention would be submitted to the CAJ at its sixty-first session, to be held in Geneva on March 25, 2010. In the case of substantial concerns the Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention would be re-discussed by the CAJ-AG at its fifth session.

Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (revision)

22. The CAJ-AG considered document CAJ-AG/09/4/3. The Chair recalled that the CAJ-AG, at its third session, had requested the Office of the Union to prepare, for its fourth session, a document containing available information that might help to explain, as requested by CIOPORA, the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act. He added that at that session, the CAJ-AG, had also agreed that, in relation to the request from ISF to include a “variety D” in figures 3 and 4 of document UPOV/EXN/EDV Draft 2, the Office of the Union should prepare a draft guidance document on the situation with regard to “variety D”, for consideration by the CAJ-AG at its fourth session (see document CAJ-AG/08/3/4 “Report”, paragraphs 12, 13 and 15).

(discussions in the presence of CIOPORA and ISF)

(a) Relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act

23. Due to the unavoidable absence of the Secretary General of CIOPORA, the representative of CIOPORA explained that written comments would be sent. She further explained that CIOPORA did not agree with the last sentence of document CAJ-AG/09/4/3, which stated that “the differences which result from the act of derivation should be one or

very few”. CIOPORA considered that more than a few differences could be present in an essentially derived variety, in particular in the case of mutations, as long as the genetic conformity was maintained. The Chair clarified that this paragraph reproduced paragraph 12 of document IOM/6/2 “Essentially derived varieties”, discussed at the sixth Meeting with International Organizations (IOM/6) held in Geneva on October 30, 1991.

24. The CAJ-AG requested the Office of the Union to develop a draft explanation on the relationship between the provisions of Article 14(5)(b)(i) and (iii) of the 1991 Act, for discussion at the fifth session of the CAJ-AG.

(b) “Variety D” in figures 3 and 4 of document UPOV/EXN/EDV Draft 2

25. The CAJ-AG concluded that the information presented in document CAJ-AG/09/4/3, paragraph 12, provided a suitable basis for the inclusion of a “variety D” in figures 3 and 4 of document UPOV/EXN/EDV, and agreed that the Office of the Union should develop a proposal for discussion at the fifth session of the CAJ-AG.

Matters referred to the CAJ-AG by the CAJ

(a) Participation of CIOPORA and the ISF in the work of the CAJ-AG

26. The Chair reported the following:

(i) the CAJ, at its sixtieth session held in Geneva on October 19, 2009, had recalled that the terms of reference of the CAJ-AG provided that “[o]bserver organizations, in particular those representing the interests of breeders, might be invited by the CAJ-AG to present their views on a particular provision of the 1991 Act to assist in their work. Where appropriate, those presentations might be made in conjunction with a CAJ session” (see paragraph 14 of document CAJ/52/4 and paragraph 67 of document CAJ/52/5, “Report”);

(ii) with regard to the request of CIOPORA and ISF for a more institutionalized cooperation with the CAJ-AG, the CAJ, at its sixtieth session, had agreed that, in the first instance, that matter should be considered by the CAJ-AG at its fourth session, and the recommendations from the CAJ-AG be reported for consideration by the CAJ at its sixty-first session, to be held in Geneva on March 25, 2010 (paragraphs 21 and 22 of document CAJ/60/10 “Report on the Conclusions”).

27. The CAJ-AG agreed that the terms of reference as set out in documents CAJ/52/4 and CAJ/52/5, paragraphs 14 and 67 respectively (reproduced in paragraph 26 above), provided an effective basis for the work of the CAJ-AG. In particular it agreed that those terms of reference enabled breeders to present their views on any relevant matter.

(b) Matters arising after the grant of the breeder’s right

28. The Chair recalled that the CAJ, at its sixtieth session, held in Geneva on October 19, 2009, had considered document CAJ/60/8 “Matters arising after the grant of the breeder’s right”, and had expressed its support for the development of a document concerning such matters. The CAJ had agreed that the Office of the Union should issue a circular inviting members of the Union to provide examples of matters that might be covered by the document. In the meantime, the CAJ had agreed that the CAJ-AG should be invited to have a first

exchange of views on the possible structure and content of such a document, at its fourth session. A report on the responses to the circular and the consideration by the CAJ-AG would be reported to the CAJ at its sixty-first session in March 2010, in order to determine how best to proceed with the development of a document (see paragraphs 47 and 48 of document CAJ/60/10 “Report on the Conclusions”).

29. The CAJ-AG agreed that the document on matters arising after the grant of the breeder’s right should cover nullity, cancellation, denomination and exhaustion of the breeder’s right.

Date and program for the fifth session

30. The CAJ-AG agreed the following program for its fifth session, to be held in Geneva on October 22, 2010, and anticipated that a full day would be necessary to cover the program:

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes (document CAJ-AG/09/5/2):
 - (a) UPOV/EXN/BRD: Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention
 - [(b) UPOV/EXN/HRV: Explanatory Notes on Acts in Respect of Harvested Material under the 1991 UPOV Convention]¹
4. Explanatory Notes on Essentially Derived Varieties under the 1991 UPOV Convention (revision) (document CAJ-AG/09/5/3)
5. Matters referred to the CAJ-AG by the CAJ
6. Date and program for the sixth session
7. Closing of the session

31. The present report has been adopted by correspondence.

[Annex follows]

¹ If document UPOV/EXN/HRV Draft 5 is approved by the CAJ-AG by correspondence, document UPOV/EXN/HRV Draft 6 will be submitted to the CAJ at its sixty-second session, to be held in Geneva on October 18 and 19, 2010 (see paragraph 18 of this report).

ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /
TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des membres/
in the alphabetical order of the names in French of the members/
in alphabetischer Reihenfolge der französischen Namen der Mitglieder/
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